IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CIVIL NO. 49 C 409

ACME FAST FREIGHT, INC., ET AL., PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered on April 27, 1949[1] by a specially constituted district court of three judges established pursuant to Sections 2284 and 2325, Title 28 of the United States Code, dismissing appellants' complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on June 24, 1949, and appeal papers were served on June 29, 1949.

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[1] The court entered no opinion, but made and entered findings of fact and conclusions of law on April 27, 1949. On May 23, 1949 the District Court, after hearing argument, denied appellant's application for stay pending appeal. The Commission's order became effective May 31, 1949.

The Commission's order,[2] dated September 16, 1948, granted Lifschultz Fast Freight (hereinafter sometimes referred to as Lifschultz or the applicant) authority to extend its operations as a freight forwarder[3] in interstate commerce between specified areas in the United States as more fully described in said report and order. In an earlier proceeding and by a permit issued in 1945, Lifschultz had been authorized to operate between

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[2] The order in terms authorized Lifschultz Fast Freight "to operate, in interstate commerce, as a freight forwarder (1) of commodities generally, between points in Maryland and Pennsylvania and points in the United States north and east thereof, on the one hand, and on the other, points in Milwaukee, Waukesha, Jefferson, Dane, Iowa, Grant, Lafayette, Greene, Rock, Walworth, Racine, and Kenosha Counties, Wis., Lake County, Ind., and in Illinois in and north of the Counties of Adams, Brown, Cass, Menard, Logan, DeWitt, Piatt, Champaign, and Vermilion, and in Iowa along the west bank of the Mississippi River from Dubuque to Keokuk, inclusive, and (2) of commodities generally (except when imported or consigned for export) between the points in Illinois, Indiana, Iowa and Wisconsin, described in (1) above, on the one hand, those in Minnesota, Texas and California, on the other . . ."

[3] As defined in Section 402 of the Interstate Commerce Act (49 U. S. C. 1002):

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to Part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating, shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination and (C) utilizes for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to Part I, II, or III of this Act.

For a full description of freight forwarder practices, see *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344; *Chicago, M., St. Paul and Pac. R. Co. et al.*, v. *Acme Fast Freight, Inc.*, 336 U. S. 465; *Freight Forwarding Investigation*, 229 I. C. C. 201; *Bills of Lading of Freight Forwarders*, 259 I. C. C. 277.

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points in, and north and east of, Maryland and Pennsylvania, on the one hand, and those in portions of Wisconsin, Indiana, Illinois, and Iowa, on the other.

Appellants, who are freight forwarders (some having nation-wide operating authority), generally in competition with Lifschultz, appeared as protestants before the Commission and opposed the granting of the authority sought by the applicant. Appellants contended there as they contended in the District Court, and as they now contend here, that the order of the Commission is unlawful and void because contrary to the statutory standards for freight forwarder operations as set out in sections 410 (c) and 410 (d) of the Interstate Commerce Act (49 U. S. C. 1010 (c) and 1010 (d)),[4] and that the order is unsupported by substantial evidence and lacking in essential findings.

Appellees submit that this appeal involves no substantial questions. Appellants' arguments as revealed by their Jurisdictional Statement are

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[4] The provisions of said sections are as follows:

Section 410 (c), (49 U. S. C. 1010 (c)):

> The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied.

Section 410 (d), (49 U. S. C. 1010 (d)):

> The Commission shall not deny authority to engage in the whole or any part of the proposed service covered by any application made under this section solely on the ground that such service will be in competition with the service subject to this part performed by any other freight forwarder or freight forwarders.

simply reiterations of arguments previously rejected by the Commission and the District Court, addressed mainly to matters lying within the discretion of the Commission. Appellants admit[5] that the conclusions reached by the Commission are substantially correct, with one or two alleged important exceptions. They explain that the significant defect in the Commission's decision is its failure to find additional facts, and the arbitrary and capricious manner in which it weighed and evaluated the evidence.

Pursuant to section 410 (c), the Commission is authorized to grant permits of the type involved in this proceeding if it "finds that the applicant is ready, able, and willing properly to perform the service proposed." As to this requirement the Commission found that:

> Applicant's readiness and ability to perform the service is not questioned. The long experience of applicant and its predecessors, and its financial condition, together with other evidence of record, establish that it is ready and able to perform the service for which authority is granted. (265 I. C. C. 431, 445)

As revealed by their Jurisdictional Statement, appellants admit that there is evidence in the record to support these findings by the Commission.[6] It must be concluded that any attack upon the Commission's findings with respect the question of readiness, ability, and willingness to perform the service proposed runs squarely against repeated

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[5] Page 6, Jurisdictional Statement (references are to mimeographed copy; "Conclusions of the Interstate Commerce Commission").

[6] Page 3, Jurisdictional Statement ("The Facts of the Case").

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enunciation by this Court that once it is established that the findings of the Commission have substantial support in the evidence and provide a rational basis for the conclusion reached, they are unassailable in a proceeding of this type. *Interstate Commerce Commission* v. *Union Pacific Railroad Co.*, 222 U. S. 541, 547; *Virginian R. Co.* v. *United States*, 272 U. S. 658, 665; *Mississippi Valley Barge Line* v. *United States*, 292 U. S. 282, 286, 287; *Rochester Telephone Corp.* v. *United States*, 207 U. S. 125, 146; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 490.

The second and only remaining finding necessary to support the Commission's order is "that the proposed service to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy" declared in the Act.

The phrase "consistent with the public interest and the national transportation policy" has been used in several sections of the Act as a standard to guide the discretion imposed in the Commission when it acts upon applications for various types of authority. Admittedly [7] a more liberal standard than that of public convenience and necessity required in the case of many other types of operating authority, it is nevertheless a standard which requires the Commission to give consideration to the transportation needs of the public, the necessity of enlarging transportation facilities, and measures which would best promote the service in the interest of the public and the commerce of the people. *New York Central Securities Corp.* v. *United*

[7] This is also the view of appellants, page 11, Jurisdictional Statement) ("Conclusions of the Interstate Commerce Commission").

States, 287 U. S. 12, 23-25. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 81-82.

In support of its determination that the authority granted "will be consistent with the public interest and the national transportation policy . . ." (265 I. C. C. 431, 445), the Commission specifically found that:

> The shippers supporting the application use applicant's service between Chicago and points in trunk-line and New England territories. They have received more prompt pick-up service and earlier delivery from applicant than from other forwarders. In addition, its efficient trading and claim-adjustment services have contributed to their preference for applicant. They anticipate similar advantage through use of the extended service here proposed, and their support is prompted by this consideration. (265 I. C. C. 431, 433-434).
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> Witnesses supporting the application are shipping between the points here involved by rail, truck, express, and air, as well as by freight forwarders. Their desire for applicant's proposed service warrants the inferences that they would ship some part of their traffic in that service. Upon cross-examination, however, they state that the services of existing forwarders have been generally satisfactory. (265 I. C. C. 431, 434).

Again we note that appellants agree (page 3, Jurisdictional Statement) that there is evidence in the record to support these findings. It should therefore be concluded that the Commission has complied with the provisions of the Act and made the basic findings necessary to support its action, and that the record furnishes substantial evidence in support of such findings. It is pertinent to note in this respect that "The judicial function is ex-

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hausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Mississippi Valley Barge Line* v. *United States,* 292 U. S. 282, 286-287.

Appellants' remaining argument in support of its contention that the applicant failed to prove that its new operation is or will be consistent with the public interest and the national transportation policy, directs attention to the alleged significant omission by the applicant of a detailed description of its proposed plan of operations including the location of terminal (assembling and distributing) points, and prophecies as to anticipated tonnage to specific destinations. It is apparent that by such an argument appellants seek to twist this proceeding into one analogous to one for a certificate of public convenience and necessity. Such an argument also completely ignores the unique nature of freight forwarder operations. The routes that the traffic will follow are, of course, the routes established by the carriers whose services the applicant will use. The volume of tonnage moved over a particular route by Lifschultz will, of course, depend in part on the individual enterprise and ability of Lifschultz in continuing to retain and add to the number of persons using its services. The tonnage also will be variable in consideration of the sales of such users. It is true that when the Commission is passing on applications for certificates of public convenience and necessity in the motor or water carrier fields, it is important that it obtain specific information as to the requirements of the public for the additional service, together with specific information as to the routes or territories sought to be served by the carrier. It is

clear, however, that these requirements are not applicable to freight forwarders, whose operations do not require investments in terminal stations, rolling stock or other equipment. It was for these reasons that the requirement that freight forwarder obtain certificates of public convenience and necessity incorporated by the United States Senate in its draft of the bill which was to become the Freight Forwarder Act was stricken from the bill when it was enacted into law.[8]

Appellants' final argument is a restatement of their contention before the Commission and the District Court, to the effect that the operations of the applicant in the territory granted would create a diffusion of traffic between forwarders with a resulting lack of speed and efficiency on the part of all forwarders. Such an argument is, of course, one addressed solely to the matter of competition. It is clear that such argument runs squarely into the specific limitation imposed on the Commission by Section 410 (d) of the Act which provides in substance that:

> The Commission shall not deny authority to engage in the whole or any part of the proposed service covered by any application made under this section solely on the ground that such service will be in competition with the

[8] The matter of the scope of authority to be given the Commission, and the standards furnished to guide its determinations, received detailed consideration by Congress at the time of passage of the Freight Forwarder Act. For the convenience of the Court pertinent excerpts from the legislative history of the Act have been set out in Appendix I, included herewith.

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> service subject to this part performed by any other freight forwarder or freight forwarders.[9]

The Commission gave specific consideration to this argument of appellants, and while finding it was not relevant, being thus addressed to the matter of competition, it found also that appellants had failed to prove their contentions. In this regard, it noted:

> While protestants' witnesses are of the view that service by applicant would divert traffic from forwarders at present serving these territories, they do not undertake to estimate the amount of diversion. In any event, such estimates would of necessity have been highly speculative. On this record, the most we can say is that there would be some diversion of traffic, but it is impossible to form any reliable estimate as to the probable extent thereof. This conclusion was reached also in the proposed report.[10] (265 I. C. C. 431, 442)

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[9] Descriptive of the legislative intent in enacting the specific provisions of Section 410 (d) are the remarks of Representative Wolverton that:

> The provision in paragraph (d) of section 410, to the effect that no application for a permit shall be denied because of the existence of other forwarder service which would be competitive, is predicated upon the essential nature of forwarder service, so far as the actual carriers are concerned. *Without such a provision, there might be a tendency to deny legitimate operations on the ground that the existing forwarder service was adequate.* The Committee was of the opinion that if the advantages of freight forwarder service are as great as are claimed for it, then the greatest opportunity should be given to persons to go into the business and to make it available to the public to the greatest extent possible. (Italics furnished) (87 Cong. Rec. 8220).

[10] At this point the Commission referred to an earlier proceeding wherein one of the present protestants made a similar allegation. Noting that there the allegation failed of proof even though the record disclosed that service had been actually

From the evidence submitted by applicant, it appears that, to the extent indicated above, applicant's proposed services are desired and would be used by certain shippers. It is not incumbent upon applicant to show that its proposed operation would not impair existing service. Applicant is in no position to make such showing. Although the extension of applicant's service probably would result in some further diffusion of the existing volume of traffic, it cannot be said that this would of necessity result in reduced frequency of service. The practice has long obtained of two or more freight forwarders loading their shipments together, in the same car, in order thereby to have sufficient tonnage to make up a carload. See for example *Kelly Freight Forwarder Application,* 260 I. C. C. 315. By participating in such coloading of traffic the individual forwarder is relieved of the necessity of holding its shipments for accumulation of a minimum carload of its own, and it is thereby enabled to dispatch shipments more frequently than otherwise would be feasible. This practice is so general that it was accorded specific recognition and sanction in part IV of the Act, and regulations have been promulgated by this Commission concerning the making and filing of joint-loading contracts. (265 I. C. C. 442-443)

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instituted by the applicant prior to the Commission proceeding, it said:

> If in *International Forwarding Co. F. F. Application, supra,* [260 I. C. C. 249, 253], Acme was unable to show, after International's service to Texas had been instituted and had been conducted over a period of time, that it had been adversely affected thereby, we cannot say that a more explicit description of applicant's proposed plan of operations would any better enable Acme to show the probable effect of the proposed service. (265 I. C. C. 431, 442)

It has thus been shown that the Commission, after carefully considering all the arguments raised by appellants, found that the applicant was ready, able, and willing to perform the service proposed, and that the authority granted is or will be consistent with the public interest and the national transportation policy. Such findings when supported by substantial evidence are unassailable in an action of this nature. As stated in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535-536, it is not true that the courts must in a litigated case be the arbiters of the paramount public interest. This is rather the business of the Commission, made such by the very terms of the statute. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 240-241; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65; *American Trucking Associations, Inc.* v. *United States*, 326 U. S. 77, 86. The District Court unanimously sustained the findings of the Commission.

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the decree of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JULY, 1949.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion to affirm was served on counsel for all parties of record by mail this 13th day of July, 1949.

WILLIAM J. HICKEY,
Special Assistant to the Attorney General.

APPENDIX I

Pertinent Excerpts from Legislative History of the Freight Forwarder Act

(87 Congressional Record 8219)[11]

While the report which accompanies the bill, at pages 14 and 22, explains the provisions of section 410 concerning permits and the differences between those provisions and those with respect to certificates of public convenience and necessity as contained in the bill as received from the Senate, the report gives none of the reasons which impelled your committee to recommend the differences that appear. The need for a statement of these reasons is accentuated by the criticism which certain trucking interests have made of this section.

As received from the Senate the bill contained provisions for the issuance of certificates of public convenience and necessity and for special recognition of "grandfather rights" with respect to forwarding operations in existence on July 20, 1937, the date of the Commission's first decision in the *Acme case* (2 M.C.C. 415). Your committee, however, has concluded that the reasons which justify such provisions in the case of carriers subject to Part I, II, or III of the Interstate Commerce Act are not paralleled in the case of forwarders. The substitute proposed therefor makes provision for the issuance of permits without reference to any "grandfather rights."

Some of the differences in the two situations may be noted. One of the basic reasons for requiring certificates in the case of carriers which perform a physical transportation service is predicated upon the fact that such carriers invest large sums in plant, facilities, and equipment, and look to the public to pay rates which shall yield a fair return

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[11] Remarks by Representative Wolverton, Member of House Committee on Interstate and Foreign Commerce, who participated actively in the handling of the bill (see *Chicago, M. St. P. & Pac. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U. S. 455).

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thereon over and above the costs of operation. It is therefore important that such investments be not made if not needed, and if the result would be to burden the public with unnecessary transportation costs, or by affording an excess of transportation facilities make it unprofitable for existing carriers to operate. Certificates are appropriate in such cases, and their issuance properly restricted to a showing of public convenience and necessity.

The case of the forwarder discloses no comparable situation. He makes no substantial investment in plant, facilities, or equipment, and devotes no material property to the public service. He is primarily a solicitor, consolidator, and shipper of the traffic of others over the transportation lines and facilities of others. The public, therefore, needs no protection against improvident investments by the forwarder in transportation property, facilities, and equipment.

Because forwarders, whether large or small, are essentially shippers in their relation to the carriers whose services they utilize, they properly should acquire no rights by reason of prior operation which would place them in any more favorable a position than any new shipper also desiring to utilize the same carrier services. For this reason your committee has concluded that it would be contrary to sound policy to give special "grandfather" rights to the comparatively few forwarders, to the disadvantage of other shippers seeking to perform similar services.

Some of the truckers have expressed dissatisfaction with the provisions in this section which enable a common carrier under part I, II, or III to own or control a forwarder. They seem to think that a monopoly of forwarding operations would result and that discriminations would be created. Neither of these suppositions is sound. The freedom on the part of anyone to engage in forwarding operations on an equal basis with other forwarders will effectively prevent monopoly, and no discriminations can result under the regulation provided by this

bill. It was the absence of such regulation that was responsible for the discriminations found by the Commission in its freight-forwarding investigation (229 I.C.C. 201).

(88 Congressional Record 4067)[12]

One of the most fundamental points of difference between the two bills (original S. 210 and House revised draft) related to the nature of the authority which is required to be obtained as a prerequisite to the engaging in forward (sic) operations.

Thus, while sufficient Commission control should be exercised to facilitate appropriate regulation, to provide for registration, and for the filing of rates, keeping of accounts, the making of reports in customary fashion, the House bill contemplated that authority to conduct forwarding operations should be granted by the Commission to all qualified applicants. Under this type of regulation it would not be necessary for an applicant to prove "public convenience and necessity" as required by the Senate bill, but the grant of operating authority would be appropriate without regard to whether the applicant would compete with existing facilities.

Upon careful consideration of the certificate and permit provisions as contained in the Senate and House bills, respectively, the conferees concluded that the House provisions were more appropriate having regard for the peculiar character of forwarding operations. Thus, while certificate provisions are contained in parts I, II, and III of the Interstate Commerce Act, in the case of common carriers by railroad, motor vehicle, and by water, the reasons which were responsible for the certificate provisions as to such carriers do not obtain in the case of freight forwarders. The primary purpose of requiring a certificate as prerequisite to operation is to protect the public from having to

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[12] Further remarks by Representative Wolverton on the provisions of the bill as reported out of conference, and as enacted into law.

support improvident investments in transportation facilities. Forwarders, however, do not customarily invest any substantial amounts of capital in physical properties or facilities of transportation, but make use of such properties and facilities as may be provided by carriers subject to Part I, II, or III of the Act.

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